IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS, INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS; INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC., a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Appellees,

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Appellees/Cross-Appellants.

From the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

APPELLANTS' SUPPLEMENTAL BRIEF

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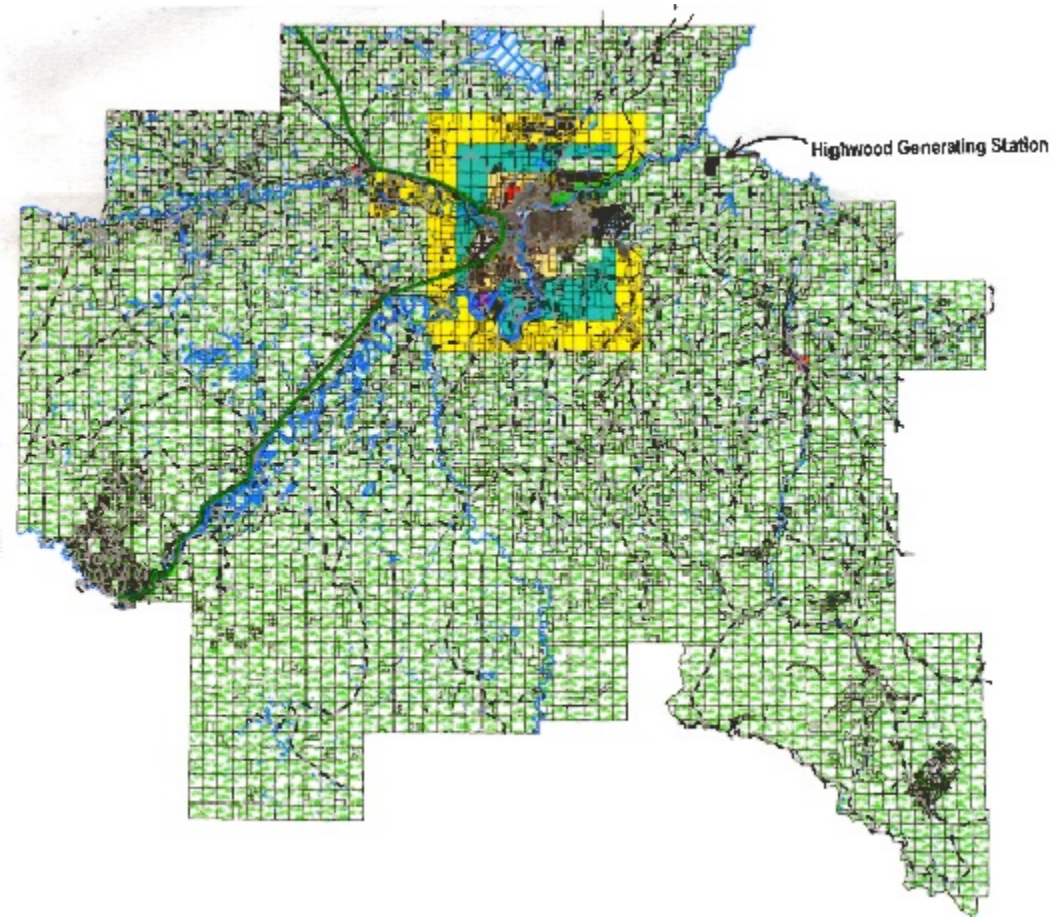
I. INTRODUCTION

In its Order of November 20, 2009, which recognized that the Commissioners "belatedly brought to the Court's attention" the amendments to the zoning regulations and zoning map enacted by the Commissioners on August 25, 2009, the Court directed the parties to file supplemental briefs to address the issue of how the amendments to the zoning regulations and zoning map "affect the spot zoning claim asserted by Plains Grains." Simply stated, the amendments do not affect the spot zoning claim.

On August 25, 2009, the Board of County Commissioners of Cascade County (Commissioners) amended certain portions of the Cascade County Zoning Regulations (CCZR) and the attendant zoning map. Since Appellants (Plains Grains) were literally ambushed by counsel for the Commissioners arguing this matter at length at the time of oral argument, there was no previous opportunity to consider the record of the August 25, 2009, amendments to the zoning regulations and zoning map. At oral argument the Court noted the absence of a record. Therefore, the entire record of that proceeding is submitted herewith at Tab W to Plains Grains' Appendix. What that record demonstrates is that during the entire amendment process not a single reference was made to the rezoning at issue in this case. (Third Affidavit of Anne Hedges, ¶ 7; Tab V.) There was no reconsideration of the rezoning, no

amendment to the rezoning — — not even mention of the rezoning. (*Id.*) Thus, the 668 acres of land rezoned from Agricultural to Heavy Industrial for the purpose of constructing the Highwood Generating Station remains unchanged, literally a black island of Industrial land surrounded by a sea of green Agricultural land on the Cascade County Zoning Map — — emblematic of what it is, a classic instance of illegal spot zoning.



(See Map at Tab W-2.)

Interestingly, one of the Commissioners' attorneys in this proceeding, Brian Hopkins (who attended every hearing in the District Court and on appeal), was personally present during Planning Board proceedings concerning the amendments, and at the time that the Commissioners adopted the amendments on August 25, 2009. (See Minutes at Tab W.) Nevertheless, no mention of the August 25 amendments was made in the brief submitted to this Court by the Commissioners on September 14, 2009. This is not surprising, since Mr. Hopkins undoubtedly realized that the amendments had nothing to do with the rezoning at issue. In fact, counsel for the Commissioners failed to bring the amendments to the attention of this Court and opposing counsel until November 10, 2009, when the Commissioners filed a Notice of Supplemental Authority in which it was expressly admitted that, "the parcels at issue in this matter remained the same," and acknowledged that the amended regulations "may or may not have a bearing on the case." No mention of mootness was made in the Notice. Thus, this Court and Plains Grains were unfairly surprised when counsel for the Commissioners argued mootness based on the amended, albeit irrelevant, regulations at the time of the November 18 oral argument.

In the discussion that follows, Plains Grains first demonstrates that, as a matter of fact, the amendments to the zoning regulations and zoning map do not affect the spot zoning claim asserted by Plains Grains. Accordingly, Plains Grains respectfully

submits that this belated argument advanced by the Commissioners verges on chicanery and should be summarily dismissed. Second, in the event that the Commissioners' new argument is not summarily dismissed, then it should be dismissed on the basis of applying the well-established principles of Montana law which govern the doctrine of mootness, specifically the exception for issues which are capable of repetition yet avoid review.

II. DISCUSSION

A. As a matter of fact, the amendments to the zoning regulations and zoning map do not affect the spot zoning claim asserted by Plains Grains.

At oral argument, the Court noted the absence of a record and questioned the credulity of the belated argument made by counsel for the Commissioners that the August 25 amendments rendered Plains Grains' appeal moot. The record of those amendments (Tab W) only serves to undermine the credibility, if not the good faith, of the Commissioners' untimely new argument of mootness: the 668 acres rezoned from Agricultural to Industrial remains unchanged, surrounded by land used and zoned as Agricultural; in fact, not a single reference was made to the land at issue in the recent zone amendment process; and the operant regulations, most notably the limitation on the placement of "Industrial Uses" in only Industrial districts, remains precisely the same.

Anne Hedges, Program Director of MEIC reviewed the entire record of the proceedings which culminated in the adoption of the amendments by the Commissioners on August 25, 2009. Her review of the record establishes the following:

> 7. [T]here was no reconsideration of the rezoning of the 668 acres of land at issue in this proceeding, there was no amendment of the rezoning at issue, and in fact there was not even mention of the rezoning at issue.
>
> 8. The Zoning Map for the 668 acres of land rezoned from Agricultural to Heavy Industrial for the purpose of constructing the Highwood Generating Station remains unchanged. It is the black island of Industrial land surrounded by the green Agricultural land on the Zoning Map at Tab W-2.
>
> 9. The regulation which defined "Industrial Uses" at the time that the Commissioners rezoned the land at issue on March 11, 2008, remains precisely the same in the amended regulations adopted August 25, 2009. In both instances, "Industrial Uses" is defined as follows:
>
> > Uses of land which are allowed by right or through the special permit process only in the I-1 or I-2 zoning classifications, as listed in these regulations.
>
> CCZR § 2.99.31, Tab I; CCZR § 2, p. 24, Tab W-1.
>
> 10. The Staff Report prepared for the Planning Board was four pages long. It contained no mention of the Highwood Generating Station, or the rezoning of the 668 acres from Agricultural to Heavy Industrial that is the subject of this appeal. Likewise, the Staff Report prepared for the County Commissioners was four pages long, and again contained no mention of the Highwood Generating Station or the rezoning of the 668 acres from Agricultural to Heavy Industrial that is at issue in this appeal. In contrast, the Staff Report prepared for the Planning Board for the zone change at issue in this lawsuit was 23 pages long, and the Staff

> Report prepared for the County Commissioners was 19 pages long. (See Appendix Tabs D & E.)
>
> 11. The record indicates that the primary concern of the public who participated in the proceeding was a proposed ban on hoofed animals. Reflective of that concern are public comments and news articles that are part of the record of the amendment proceedings. . . .

(Third Affidavit of Anne Hedges at ¶¶ 7-11; Tab V.)

Thus, the record demonstrates that the amendments to the zoning regulations and zoning map do not affect the spot zoning claim asserted by Plains Grains. The Court will recall that the District Court found "compelling" bases in favor of Plains Grains' claim of spot zoning, but determined that the rezoning was not spot zoning on the singular (and erroneous) basis that under a special use provision in the A-2 District, the coal-fired power plant proposed by SME for the site was "already permissible in that agricultural area prior to the rezoning request." (Order at p. 25; Tab A.)

Specifically, the District Court based its conclusion on the special use exception in the A-2 District for "Commercial Wind Farms/Electrical Generation Facilities." However, the District Court's conclusion is fatally flawed by the unambiguous limitation set forth in the Cascade County Zoning Regulations which allow "Industrial Uses" **only** within an I-1 or I-2 zoning district. That regulation which defined "Industrial Uses" at the time that the Commissioners rezoned the land

at issue on March 11, 2008, remains precisely the same in the amended regulations adopted August 25, 2009. In both instances, "Industrial Uses" is defined as follows:

> Uses of land which are allowed by right **or through the special permit process ONLY in the I-1 or I-2 zoning classifications**, as listed in these regulations.

(CCZR 2.99.31, Tab I; CCZR § 2, p. 24, Tab W-1; emphasis added.)

So too is the definition of "Heavy Industrial" unchanged in the amended regulations:

> **Place and/or building**, or portion thereof, that is used or is intended for **the following or similar uses**: **processing** or manufacture of **materials** or products predominantly **from extracted or raw materials**; **storage of** or manufacturing processes using **flammable** or explosive **materials**; or **storage or** manufacturing **processes** that **potentially involve hazardous or commonly recognized offensive conditions**; the term **includes** motor vehicle assembly, **oil refineries**, textile production, **sawmills**, post and pole plants, log yards, asphalt and concrete operations, primary metal processing, **and the like**.

(CCZR § 2.99.28, Tab I; CCZR § 2, p. 23, Tab W-1; emphasis added.)

The proposed use of the land for an electrical power generating complex is undeniably a Heavy Industrial use. As the Rezoning Application itself acknowledged:

> The **requested rezoning to Heavy Industrial** use is **a prerequisite** to the planned **construction and operation** of an electrical generation station, known as the **Highwood Generating Station** . . .

(Rezoning Application; Tab C, p. 1; emphasis added.)

Regardless of the August 25 amendments, whether a coal-fired power plant or a gas-fired power plant, both are still Industrial Uses and "only" permitted in the I-1 or I-2 zoning classifications. Hence, the District Court's error in determining that the rezoning was not spot zoning on the basis of a special use permit provision in the A-2 district was, and remains, clearly erroneous.

In sum, the amended zoning regulations and zoning map do not affect the spot zoning claim asserted by Plains Grains. During the entire amendment process, not a single reference was made to the rezoning at issue in this case. The 668 acres of land rezoned from Agricultural to Heavy Industrial literally remains a black island of industrial lands surrounded by the sea of green agricultural land on the zoning map. (See Tab W-2.) Likewise, the zoning regulations which undermine the singular basis upon which the District Court determined that the rezoning was not spot zoning remain precisely the same. Indeed, the reason that the zoning regulations and zoning map provisions at issue in this case were never mentioned is that they were neither reconsidered nor amended. Instead, the focus of the amendment process was on those portions of the regulations that were amended, such as the proposal to phase out hoofed animals, which drew enormous attention. (Third Affidavit of Anne Hedges, ¶ 11; Tab V.) Contrary to the representations made by counsel for the Commissioners at the time of oral argument, the record demonstrates that the amendments to the

zoning regulations and zoning map do not render Plains Grains' appeal moot.

B. As a matter of law, the amendments to the zoning regulations do not render Plains Grains' appeal moot.

At oral argument, counsel for the Commissioners relied exclusively upon the case of *Country Highlands Homeowners Assn., Inc. v. Board of County Comm'rs of Flathead County*, 2008 MT 286, 345 Mont. 379, 191 P.3d 424, in arguing that the August 25, 2009, amendments to the zoning regulations rendered Plains Grains' appeal moot. That case is entirely distinguishable on its facts. Moreover, plaintiffs in that case disavowed reliance on the exception to mootness based on the "capable of repetition yet avoid review" doctrine. As explained above, the Court need not reach the issue of whether the exception applies since the record demonstrates that the amendments to the zoning regulations and zoning map do not effect Plains Grains' spot zoning claim. Relevant in that regard, "A party seeking to establish that an issue raised on appeal is moot has a heavy burden. *Clark v. Dussault* (1994), 265 Mont. 479, 484-85, 828 P.2d 239, 242. The Commissioners have not met this heavy burden. However, in the event that the Court addresses the issue of mootness in regards to the August 25 amendments, then the exception to mootness clearly applies to the instant case.

1. The authority relied upon by the Commissioners and SME is distinguishable on the facts.

In *Country Highlands*, the plaintiffs challenged a series of land use decisions made by the Flathead County Commissioners over a two year period, including a zone change and an amendment to the Growth Policy. On appeal, plaintiffs' first argument, which the Court noted was raised for the first time on appeal, was based on the requirement that related planning documents must be consistent. However, it was summarily rejected since it was not raised below. *Id.* at ¶ 18. As summarized by the *Country Highlands*' Court, plaintiffs' second and only remaining argument was based on the premise that the zoning district amendment at issue was inconsistent with the 1987 Growth Policy:

> Country Highlands' second argument is two-fold. Country Highlands asserts that the 2005 Zoning District amendments is impermissibly inconsistent with the 1987 Growth Policy because it is premised on the 2004 Growth Policy amendment, which conflicted with the 1987 Growth Policy. Essentially, Country Highlands asks us to invalidate the 2004 Growth Policy amendment on the basis that it was inconsistent with the 1987 Growth Policy, and then invalidate the 2005 Zoning District amendment because it was based on the flawed 2004 Growth Policy amendment.

Country Highlands, ¶ 19.

While the *Country Highlands* case was pending on appeal, Flathead County replaced the 1987 Growth Policy with the 2007 Growth Policy. *Id.*, ¶ 13. On this basis, the Board of Commissioners argued that the only argument properly before the

Court on appeal had been rendered moot:

> The Board asserts that these arguments are now mooted because the 1987 Growth Policy has been repealed and replaced by the 2007 Growth Policy. The Board contends that even if this Court "ruled that the Commissioners improperly amended the 1987 Growth Policy, that document no longer has any effect and no longer presents an actual controversy."

Id. at ¶ 20.

The Court agreed, noting that:

> If we were to invalidate the 2005 Zoning District amendment because of asserted inconsistencies with the 1987 Growth Policy, it would still exist and be presumed valid under the 2007 Growth Policy - a later legislative enactment. *North 93 Neighbors,* ¶ 18. A challenge would still be necessary to determine whether it was consistent with the 2007 Growth Policy, which has superseded the 1987 Growth Policy. The issue of whether the 2005 Zoning District amendment is consistent with the current 2007 Growth Policy is not before us for consideration. *Dayberry,* ¶ 24.
>
> In sum, the particular issues raised on appeal are dependent upon the 1987 Growth Policy, which no longer has any effect in Flathead County.

Id., ¶¶ 22, 23 (emphasis added).

The Commissioners' reliance on *Country Highlands* in this proceeding is entirely misplaced. As demonstrated above, unlike *Country Highlands*, the particular rezoning at issue in this appeal still has effect. It has not been "superseded" by the August 25 amendments. In fact, the record of the August 25 amendments demonstrates that there was no reconsideration of the rezoning at issue, no

amendment to the rezoning, not even mention of the rezoning. (Third Affidavit of Anne Hedges, ¶ 7; Tab V.) The 668 acres of land rezoned from Agricultural to Industrial remains unchanged, and the operant regulations, including the limitation on the placement of "Industrial Uses" only in Industrial districts, remains precisely the same.

Moreover, the 2006 Cascade County Growth Policy has not been superseded by a new Growth Policy. In that regard, one indicia of "special legislation" under the third prong of the *Little* and *Greater Yellowstone Coalition* spot zoning test[1] is whether the requested use is in accord with the comprehensive land use plan for the area, here the 2006 Cascade County Growth Policy. As previously pointed out, emblematic of the substantial inconsistency of the rezoning at issue with the "comprehensive land use plan for the area" (*GYC* at ¶ 29), is the failure of the Commissioners to give any consideration whatsoever to the very "landscape unit" in the Cascade County Growth Policy that encompasses the subject property. (*See* 2006 Growth Policy at pp. 52-54, discussing the "Benches and Dissected Benches" landscape unit; Tab U.) Included among the policies that are to be considered in

[1]See *Little v. Bd. of County Comm'rs of Flathead County* (1981), 193 Mont. 334, 346, 631 P.2d 1282, 1289; and *Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County (GYC)*, 2001 MT 99, ¶ 29, 305 Mont. 232, 25 P.3d 168.

regards to this area is the following: "Since the existing land use of the benches and dissected benches landscape unit is predominantly agriculture, special consideration should be given to protect this use." (*Id.*, p. 54.) Unlike *Country Highlands*, here the 2006 Cascade County Growth Policy has not been amended. The Growth Policy remains as it was at the time that the Commissioners made their decision to rezone the land at issue, and the Commissioners' failure to give any consideration, let alone special consideration, to the plan's provisions for the very area rezoned further establishes the third prong of the spot zoning test.

Here, the District Court determined that under the third prong of the *Little/GYC* spot zoning test the rezoning at issue was indeed "special legislation," which ruling is now subject to cross-appeal by SME. However, the District Court's determination properly reflects the "primary focus" of the third *Little/GYC* factor, which as this Court explained in *Boland v. City of Great Falls* (1976), 275 Mont. 128, 134, 910 P.2d 890, 894, is "not the benefit resulting from the development of the Property, but rather the benefit to landowners as a result of the rezoning." Applying this standard, the *Boland* Court noted that the nearby landowners in the residential district would be positively impacted by the proposed new higher density residential development on blighted land, on which basis the Court affirmed the determination that "the zoning change would benefit the adjacent property owners whose property values

tend to increase from the project development." *Id.*, 275 Mont. at 135, 910 P.2d at 894. This is in contrast to the facts in the instant case, where in concluding that the rezoning was indeed "special legislation," the District Court recognized that:

> A truly substantive argument of the Plaintiffs is that one landowner (be it viewed as either SME, the current deed holder, or the Urquharts, the applicants) will benefit at the expense of others. That expense is not merely the location of a power plant in the "Back 40" but the power lines, rail spurs, and other industrial detritus of a large, power generating facility.

(Order, p. 25; Tab A, emphasis added.)

Although SME has attempted to make a disingenuous use of *Boland* by citing to the *Boland's* Court's discussion of "general community benefits," that discussion was in the context of whether the zoning ordinance at issue "bears a reasonable relationship to the advancement of the public health, safety, morals or general welfare of the community," and not in relationship to the third prong of the *Little/GYC* test. *See Boland*, 275 Mont. at 135, 910 P.2d at 895.

Likewise, SME's reliance on this Court's recent decision in *Lake County First v. Polson City Council,* 2009 MT 322, 352 Mont. 49, 218 P.3d 816, to defeat a determination of "special legislation," is similarly misplaced. According to SME, if a super Wal-Mart store passes the special legislation test, then an electrical generating facility must also pass the special legislation test. However, the Court in *Lake County First* explained that special legislation was not involved because, "Here, the property

at issue is bound on three sides by HCZD, or highway commercial zoning. Commercial uses are currently established to the north and south of the property. Thus, the zoning change and proposed use of the property are not significantly different than the prevailing use in the area." *Id.*, ¶ 52. This stands in stark contrast to the instant case, where the zoning change from Agricultural to Industrial and the proposed use of the property for SME's electrical generation complex are significantly different than the exclusively agricultural use in the area, which is once again emblematic of special legislation.

In sum, there is neither a factual nor legal basis for the August 25, 2009, zoning amendments to "affect the spot zoning claim asserted by Plains Grains."

2. The "capable of repetition yet avoid review" exception to the mootness doctrine applies to the instant case.

Significantly, the *Country Highlands*' Court noted that, "Country Highlands does not argue the exception to mootness." *Country Highlands*, ¶ 17(citing *Montana-Dakota Utils. Co. v. City of Billings,* 2003 MT 332, ¶ 7, 318 Mont. 407, ¶ 7, 80 P.3d 1247, ¶ 7.)

In *Montana-Dakota Utilities*, the City of Billings adopted an ordinance controlling the use of public rights-of-way within the city and providing for the payment of fees from utilities using public rights-of-way, including a franchise fee based on a percentage of gross annual revenues received from the provision of

telecommunications or utility services within the city. *Id.*, ¶ 3. However, a successful initiative drive placed the ordinance on the ballot, and Billings' voters rejected the measure. *Id.,* ¶ 5.

Although the *Montana-Dakota Utilities*' Court acknowledged that the Court does not generally address moot questions, it nevertheless determined that it was appropriate to decide the validity of the city ordinance, noting that the Billings' City Council had previously passed a similar ordinance, which was also withdrawn in the face of a referendum drive. Thus, the Court noted that in the absence of appellate review, the question would likely arise again, and on this basis concluded that appellate review of the franchise fee controversy was appropriate under a recognized exception to the mootness doctrine for issues which are "capable of repetition yet avoid review." In making this determination the *Montana-Dakota Utilities*' Court relied on a two-part test, requiring a demonstration that, "(1) the challenged action must be too short in duration to be fully litigated prior to cessation; and (2) there must be a reasonable expectation that the same complaining party would be subject to the same action again." *Id.* at ¶ 7 (citing *Skinner Enterprises, Inc. v. Lewis and Clark City-County Health Dept.*, 1999 MT 106, ¶ 18, 294 Mont. 310, 980 P.2d 1049; and *Heisler v. Hines Motor Co.* (1997), 282 Mont. 270, 275-76, 937 P.2d 45, 48.)

This two-part test is clearly met in the instant case. As described in the Affidavit of Anne Hedges submitted herewith:

> 13. This current lawsuit is not the first lawsuit involving the rezoning of the land at issue from Agricultural to Heavy Industrial in order to allow for the construction of SME's electrical generation complex. On November 29, 2006, also on a 2-1 vote, the Commissioners approved the requested zone change. On December 21, 2006, MEIC and many of the other plaintiffs in this proceeding filed suit against the Commissioners challenging the legality of the rezoning on many of the same grounds later at issue in this lawsuit, including spot zoning. After Plaintiffs filed a comprehensive motion and brief for summary judgment, the Commissioners acknowledged that the rezoning was not in compliance with state law and the Commissioners invalidated the rezoning decision. By Order dated June 21, 2007, the Plaintiffs' first lawsuit was dismissed. The Commissioners then amended the Cascade County Zoning Regulations on October 23, 2007, and on March 11, 2008, the Commissioners, again on a 2-1 vote, reapproved the rezoning which was then challenged by the lawsuit which is the subject of this appeal.

(Third Affidavit of Anne Hedges at ¶ 13; Tab V.)

Assuming *arguendo* that the August 25, 2009, amendments to the zoning regulations somehow superseded the March 11, 2008, rezoning at issue, then the challenged action has already been proven to be too short in duration to be fully litigated prior to cessation, and the record further establishes that there is now a reasonable expectation that the same complaining parties would be subject to the same action again. In other words, the spot zoning at issue remains precisely as it was prior to the August 25, 2009, amendments — the same black Industrial island surrounded on the zoning map as the sea of green Agricultural land. (See Zoning Map

at Tab W-2.) Hence, the challenged action falls within the exception for issues which are "capable of repetition yet avoid review." As further explained in the Affidavit of Anne Hedges, this "revolving door" not only undermines the legitimate efforts of Montana citizens to challenge the legality of a legislative act of their local governing body, but threatens to allow a demonstrably illegal action to evade review:

> 14. After years of litigation, Montana citizens challenging the legality of a legislative act of their local governing body in rezoning the land from Agricultural to Heavy Industrial, have still not received a judicial determination as to whether the rezoning at issue constitutes spot zoning. Counsel for the Commissioners' suggestion at oral argument that the August 25, 2009, amendments to the zoning regulations requires that Appellants now file a third lawsuit to challenge the rezoning at issue threatens to undermine the confidence of these concerned citizens in our system of justice, and challenges the financial resources which they are willing and able to dedicate to this process. Thus, if Appellants were now to be required to file yet a third lawsuit challenging the legality of rezoning at issue, the Commissioners' action might well evade review.

(*Id.*, ¶ 14.)

In sum, mootness is intended to get rid of cases that are dead. As this Court explained in *Van Troba v. Montana State Univ.*, 1998 MT 292, ¶ 35, 291 Mont. 522, 970 P.2d 1029, a question becomes moot on appeal "where by a change of circumstances prior to the appellate decision the case has lost any practical purpose for the parties, for instance where the grievance that gave rise to the case has been eliminated." This case is not moot. It retains a significant practical purpose for the

parties, as the controversy regarding the validity of the rezoning that gives rise to this case continues. SME lacks financing and requires permitting, yet SME is still struggling to build a power plant on land illegally rezoned Heavy Industrial.[2]

Again assuming *arguendo* that the August 25, 2009, amendments to the zoning regulations somehow superseded the rezoning at issue, then other reasons compel application of the "capable of repetition yet avoid review" exception to the mootness doctrine in this case. To rule otherwise would condemn concerned Montana citizens challenging the legality of such legislative enactments to the fate of *Sisyphus*, and entice local governing bodies to absolve themselves of judicial review on the basis of legislative reenactments amounting to chicanery. This Court must be vigilant in recognizing such circumstances which could be used to avoid review. As the Court aptly noted in *J.M. v. Montana High Sch. Assn.* (1994), 265 Mont. 230, 241, 875 P.2d 1026, 1033: "To mechanically apply the doctrine of mootness under such circumstances would effectively deny the remedy of appeal."

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[2] In addition to the fact that SME still struggles to secure financing to construct the now gas-fired power generation complex, counsel for the Commissioners pointed out at oral argument that SME has not yet obtained all of the permits needed to construct the complex. Specifically, SME must obtain a new Location Conformance Permit for the gas-fired complex. This requirement is not a function of the adoption of the amended regulations, but a result of SME's failure to construct the coal-fired plant for which it had previously received a permit.

III. CONCLUSION

This Court's November 20, 2009, Order directed the parties to file supplemental briefs to address the issue of how the August 25, 2009, amendments to the zoning regulations and zoning map "affect the spot zoning claim asserted by Plains Grains." As demonstrated above, the amendments do not affect the spot zoning claim. At oral argument when counsel for the Commissioners advanced the argument regarding this matter, the Court noted the absence of a record. The entire record of that proceeding has now been submitted and reviewed. Contrary to the characterization by Commissioners' counsel at oral argument, there was not a "wholesale" rewriting of the zoning regulations. More to the point, what that record demonstrates is that during the entire amendment process, including Staff reports, proceedings before the Planning Board, and proceedings before the Commissioners, not a single reference was made to the rezoning at issue in this case. (Third Affidavit of Anne Hedges, ¶ 7; Tab V.) There was no reconsideration of the rezoning, no amendment to the rezoning, or even mention of the rezoning. (*Id.*) The 668 acres rezoned from Agricultural to Industrial remains unchanged on the zoning map, a black Industrial island surrounded by a sea of green land zoned as Agricultural. Likewise, the operant zoning regulations, most notably the limitation on the placement of "Industrial Uses" in only Industrial districts, remains precisely the same.

The singular authority relied upon by counsel for the Commissioners in arguing that the August 25, 2009, amendments to the rezoning regulations rendered Plains Grains' appeal moot was the case of *Country Highlands, supra.* That case is entirely distinguishable on its facts, and did not involve the exception to mootness based on the "capable of repetition yet avoid review" doctrine. If the Court even addresses the issue of mootness in regards to the August 25 amendments, then the exception to mootness clearly applies and the Court should rule on the merits of the appeal. Plains Grains requests that the Court reverse the District Court and declare unlawful the rezoning from Agricultural to Heavy Industrial.

Respectfully submitted this 18th day of December, 2009.

/s/ Roger M. Sullivan
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is produced in proportional font (Times New Roman) of not less than 14 point type, utilizes double line spacing, except in footnotes, headings and extended quotations, which are single spaced, and the word count calculated by WordPerfect 12 for Windows does not exceed 5,000 words, excluding certificate of service and certificate of compliance.

Dated this 18th day of December, 2009.

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I hereby certify that on this 18th day of December, 2009, a true and correct copy of the foregoing document has been served via U.S. First Class Mail upon the following:

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